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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CHITO ANTANGAN et al., Plaintiffs and Appellants, v. SHEA HOMES LIMITED PARTNERSHIP, Defendant and Respondent.	2d Civil No. B227527 (Super. Ct. No. 242632) (Ventura County)
JIMMY ALCOVA et al., Plaintiffs and Respondents, v. SHEA HOMES LIMITED PARTNERSHIP, Defendant and Appellant.	2d Civil No. B230097 (Super. Ct. No. 242632) (Ventura County)

Plaintiffs Chito Antangan, Nenita Antangan, Charlene Arimura, Lucretia Cameron-Vicuna, Douglas Saint, Ruben Chavez and Suzana Chavez (collectively "Antangan") appeal an order vacating a judgment and entering a modified judgment in their construction defect action against defendants Shea Homes, Inc. and Shea Homes

Limited Partnership. Pursuant to an agreement of the parties, this case was tried before a judicial referee. (Code Civ. Proc., § 638.)[1]

Defendant Shea Homes Limited Partnership (hereafter "Shea Homes") appeals an order of the judicial referee denying its motion to strike and tax costs.

On the Antangan appeal, we conclude, among other things, the trial court did not err by vacating and modifying its judgment so that the cost of referee's fees would be equally divided by the parties and consistent with a prior stipulation they filed in court.

On the Shea Homes appeal, we conclude: 1) the judicial referee did not err by ruling that plaintiffs' offers to compromise (§ 998) were validly served on Shea Homes' counsel, 2) the offers substantially complied with statutory requirements, 3) the offers were not required to be apportioned, and 4) the referee's award of $5,000 as costs for a person assisting plaintiffs' counsel was not an abuse of discretion. We affirm the judgment and orders the parties have challenged on appeal.

FACTS

Plaintiffs Chito Antangan, Jimmy Alcova and other homeowners brought an action against defendants Shea Homes, Inc. and Shea Homes Limited Partnership for damages alleging that the properties they purchased from these "developer defendants" were defective. Plaintiffs claimed numerous construction defects required them "to incur expenses" for "restoration and repairs" and the value of their homes had been diminished.

At the time of sale, the home buyers signed a document entitled "Shea Homes Purchase Agreement and Escrow Instructions." It contained a provision providing, "If Buyer commences a lawsuit . . . relating to the condition, design or construction of any portion of the Property, all of the issues in such action, whether of fact or law, shall be submitted to general judicial reference pursuant to California Code of Civil Procedure Sections 638(1) and 641-645.1 . . . ." It also provided, "*The Parties shall share equally in the fees and costs of the referee, unless the referee orders otherwise*. The Parties shall be responsible for their own attorney fees." (Italics added.)

[1] All statutory references are to the Code of Civil Procedure.

In response to the complaint, the Shea Homes defendants filed a motion for an order appointing a judicial referee. The court granted the motion and ruled that a referee would "try all issues" and "report a statement of decision to this court."

On April 9, 2009, the parties filed a "stipulation and order re: judicial reference protocol" in the trial court ("April 9th order"). In this order, the parties agreed that Merville Thompson would be the referee, and "*Thompson's fees shall be split as follows: one-half (1/2) by Shea and one half (1/2) by Plaintiffs*." (Italics added.) The parties and the judicial referee signed the order. The trial court approved this order and ordered its provisions enforced.

On June 16, 2009, plaintiffs dismissed all causes of action against the Shea Homes, Inc. defendants.

On May 10, 2010, after a trial conducted by the judicial referee, Thompson filed his report to the trial court which contained findings favorable to plaintiffs. He awarded plaintiffs damages and various costs, and ruled that "Shea Homes shall bear all of the Referee's fees."

On May 27, 2010, the trial court entered a "Judgment on Findings of Fact and Law Pursuant to Judicial Reference," which included the referee's finding that "Shea Homes shall bear all of the Referee's fees."

On July 15, 2010, the trial court granted Shea Homes' motion to vacate the May 27th judgment because the April 9th order required an equal split of the referee's fees and the judgment was not consistent with that requirement. The court entered a modified judgment to correct the error by eliminating the language that had required Shea Homes to bear all of the referee's fees.

On July 16th, plaintiffs filed a memorandum of costs. They sought, among other things, $54,409.90 for expert fees, and $14,812.50 for the services of Melissa Fox for "exhibit preparation & trial presentation." Shea Homes filed a motion to strike and/or tax costs claiming: 1) Fox was a paralegal, 2) plaintiffs were not entitled to attorney's fees, and 3) the fees for Fox's services were an indirect and improper method to obtain attorney's fees. The referee disagreed and awarded $5,000 for Fox's services. The referee also ruled

that plaintiffs had properly served valid offers to compromise (§ 998) on Shea Homes' counsel in 2009. He said those offers to defendants in the case at that time did not have to be apportioned.

DISCUSSION

The Order Vacating and Modifying the Judgment (The Antangan Appeal)

Antangan contends the trial court erred when it vacated and modified its original judgment, which ordered Shea Homes to pay all the referee's fees. We disagree.

Antangan notes that the real estate "purchase agreement" provided that "the Parties shall share equally in the fees and costs of the referee, *unless the referee orders otherwise*." (Italics added.) But in the April 9th order, the parties changed that provision and agreed that the referee's fees be split equally. The referee ignored that order by ruling that "Shea Homes shall bear all of the Referee's fees." After the trial court filed its judgment that included this language, Shea Homes moved to vacate it because it was inconsistent with the April 9th order. The court agreed and vacated its prior judgment, ruling that its April 9th order required a "50-50 allocation." It said section 473 authorized setting aside the judgment that had included the erroneous allocation.

Antangan claims the original purchase agreement governs and allows the referee to reject a 50-50 split. He claims the April 9th order was not valid, and consequently the trial court erred by vacating its original judgment.

Shea Homes responds that the April 9th order modified the purchase agreement and was binding on plaintiffs. We agree. A contract may be modified by a stipulation by the parties that changes the operative terms of the original agreement. (*Texas Co. v. Todd* (1937) 19 Cal.App.2d 174, 185.) Here the stipulation modified the authority of the referee. It was a binding agreement that superseded the original contract. (*Id*. at pp. 185-186.) The parties could reasonably rely that it became the standard for the referee's fees. (*Ibid.*; *Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 986.) The stipulation to a 50-50 split estopped plaintiffs from demanding a different allocation. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.)

Moreover, the trial court approved the April 9th order and ordered its provisions enforced. The court's order that the referee's fees be split evenly deprived the referee of the authority to reach a different result. Courts may not act in excess of their jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Neither may referees. Where a referee acts beyond the scope of his or her authority, the trial court may vacate that portion of the referee's decision. (*Estate of Bassi* (1965) 234 Cal.App.2d 529, 539-540; *Swycaffer v. Swycaffer* (1955) 44 Cal.2d 689, 694.)

Here the trial court also vacated its initial judgment when it discovered it had erroneously and mistakenly included language about the referee's fees that conflicted with its April 9th order. Antangan claims the court had no authority to do so. We disagree. A trial court has inherent authority to vacate or correct a judgment that is void on its face, incorrect, or entered by mistake. (§ 473; *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1237; *Olivera v. Grace* (1942) 19 Cal.2d 570, 574 ["apart from statutory authority, all courts are said to have an inherent power to correct their records so as to make them speak the truth"].) The April 9th order finally resolved and removed the percentage of referee's fees issue from this case. The court properly corrected the portion of its prior judgment that conflicted with it and entered a modified judgment. (*Swycaffer v. Swycaffer*, *supra*, 44 Cal.2d at p. 694.) There was no error.

The Shea Homes Appeal

Shea Homes notes that the referee ruled that it was responsible for paying plaintiffs' experts' fees because of plaintiffs' offers to compromise. (§ 998.) It claims the award of fees must be vacated because the offers were not properly served and did not comply with statutory requirements.

Service of the Offers to Compromise

Shea Homes suggests there is no evidence in the record to support a finding that the offers to compromise were validly served on its counsel. We disagree.

Shea Homes notes that the proofs of service by mail on the offers to compromise indicate that the envelopes containing those offers were addressed to "Carlo A. Coppola [¶] Wood, Smith, Henning & Berman LLP [¶] 10960 Wilshire Boulevard

10960 Wilshire Boulevard [¶] Los Angeles, CA 90024." Shea Homes claims the address on the envelopes is deficient because: 1) the street address is stated twice, and 2) the floor or suite within that building where the firm is located was omitted.

But the street address of the firm is correct, the city and zip code are correct, and the name of the law firm is correct. Any postal delivery person would know that the Wilshire Boulevard street address written on the envelope was merely a duplication. The important fact is that the street address was correct.

Shea Homes claims that because the suite or floor number of the law firm was missing from the envelopes, service by mail is defective. Shea Homes' law firm is located on the 18th floor of the building at 10960 Wilshire Boulevard. The firm does not list any suite or room number on its pleadings; it simply lists its location in the building as the "18th Floor." The referee found that the "service" at the correct street address was "in substantial compliance with the mailing statutes," even though the floor number was omitted

In *Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58, the Court of Appeal rejected the argument that mailing a notice of default to an attorney was deficient "because it was not addressed to include the floor or suite number of her office in a large office building." The court said, "We find this argument somewhat disingenuous. The mailing was directed to counsel, by name, as counsel for the bank, at the proper address, a building which serves as principal headquarters for the bank. [¶] We are not unmindful of the realities of mail delivery at one of the largest buildings in Los Angeles. The mailing address utilized, however, is in substantial compliance with section 1013 of the Code of Civil Procedure." (*Id*. at pp. 58-59.) It was in *Jackson*, and it is here.

Major treatises have reached the same conclusion. "[P]roof of service has been deemed adequate where it included the recipient's street address only . . . ." (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 23, p. 447, citing cases including *Douglas v. Janis* (1974) 43 Cal.App.3d 931, 936 [claim that service was defective because it did not include "room number" at the building].) "A declaration of mailing is sufficient if it shows the correct *street* address of the attorney's office building -

even if the floor or suite number is omitted! The street address alone is deemed 'substantial compliance' with CCP § 1013." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 9:86.6.)

Shea Homes cites *Triumph Precision Products, Inc. v. Insurance Co. of North America* (1979) 91 Cal.App.3d 362, 365, for the proposition that "[w]here the envelope containing the notice is improperly addressed, it is as though notice were never mailed . . . ." But here the street address was correct. Moreover, the *Triumph Precision Products* case is distinguishable because there the envelope did not include the name of the party's law firm and it was undisputed that it "had been subsequently returned" by the postal service. (*Id*. at p. 364.)

Shea Homes claims it submitted declarations supporting a finding that the offers were not received by its law firm. But plaintiffs submitted declarations in the form of proofs of service. (*Forslund v. Forslund* (1964) 225 Cal.App.2d 476, 486 [certificates of mailing establish the evidentiary presumption "that service was made" to the place indicated in the certificate].) In addition, plaintiffs' counsel said, "Plaintiffs *did not receive the 988 offers back marked as* '*undeliverable*'" by the postal service. (Italics added.) They also challenged the sufficiency of Shea Homes' declarations. Even without these challenges, the trier of fact was not required to accept the facts in Shea Home's declarations. (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717 ["trial court is not bound by uncontradicted evidence"]; *Bazaure v. Richman* (1959) 169 Cal.App.2d 218, 222 [trial court was "free to reject" interested party's testimony even if it "was otherwise uncontradicted and unimpeached"].)

Here the referee implicitly resolved all factual and credibility issues regarding this dispute against Shea Homes. We do not decide the weight or credibility of the evidence; that is a matter exclusively for the trier of fact. (*Glasser v. Glasser* (1998) 64 Cal.App.4th 1004, 1010-1011 [whether evidence was sufficient to prove document was not received is a matter for the trial court]; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479; *Church of Merciful Saviour v. Volunteers of America, Inc.* (1960) 184 Cal.App.2d 851, 856.)

Section 998 Offers-Compliance with Statutory Language Requirements

Shea Homes contends the 998 offers were invalid because they did not comply with the requirements of section 998. We disagree.

Section 998 sets forth the procedure for making and accepting offers to compromise and settle litigation. Subdivision (b) of this section provides, in relevant part, "The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted."

The offers in the present case contain the phrase, "This offer is made pursuant to the terms of *Code of Civil Procedure* Section 998, and if not accepted as provided therein, Shea will be subjected to all the penalties stated therein."

Shea Homes claims this language about acceptance of the offers is deficient. It relies on *Puerta v. Torres* (2011) 195 Cal.App.4th 1267. There, the Court of Appeal concluded that a 998 offer was invalid because it "contained" no language "regarding acceptance" of the offer. (*Id*. at p. 1273.) It only contained "the terms of the offer itself and its expiration date." (*Ibid.*) The court said, "[T]here is room for interpretation as to how an appropriate statement regarding acceptance might be phrased . . . ." (*Ibid*.) But a 998 offer must include "at least *some* indication of how to accept" it. (*Ibid.*)

The language plaintiffs used about acceptance informs the reader to follow the procedure set forth in the statute. When the recipient does this, he or she will read that acceptances must be in writing and signed by counsel. (§ 998, subd. (b).) The language plaintiffs used could have been more complete and explicit, but it nevertheless gives the reader "at least *some* indication of how to accept" the offers. (*Puerta v. Torres*, *supra*, 195 Cal.App.4th at p. 1273.) Plaintiffs did not set forth the acceptance procedure using all the language in the statute.

But the issue is substantial compliance. "An otherwise clear section 998 offer is not rendered invalid simply because it does not track precisely the language of the statute." (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 728.) The *Puerta* court recognized that the Legislature provided litigants "room for interpretation as to how" to compose the

language in the offers to comply with the statute. (*Puerta v. Torres, supra,* 195 Cal.App.4th at p. 1273.) Consequently, there are various alternatives. Plaintiffs elected to refer defendants to the exact statutory language for the requirements for acceptance. This guides the reader to the right path. The advisements in plaintiffs' offers also gave notice to defendants about the consequences of not accepting the offers, the fees they could face, and the specific subdivision of the statute regarding those fees. Any attorney reading these offers would not be confused about the method of acceptance and the consequences for rejecting the offers. That fulfills the goal of the section 998 statute, which is the most critical factor here. In such a case, """[t]he legislative purpose will not be sacrificed to a literal construction""" if it leads to a loss of the party's right to costs merely because of his counsel's less than perfect choice of words. (*Berg*, at p. 729.)

Lack of Apportionment in the Section 998 Offers to Compromise

Shea Homes contends plaintiffs' 998 offers "were invalid since they did not apportion the damages among multiple defendants." (Underscoring omitted.) It claims the referee erred by ruling that the lump sums in the individual 998 offers did not have to be apportioned. We disagree.

"[A] plaintiff who makes a § 998 offer to joint defendants having *potentially varying liability* must specify the amount plaintiff seeks from *each defendant*." (*Burch v. Children's Hospital of Orange County Thrift Stores, Inc*. (2003) 109 Cal.App.4th 537, 547.) But where defendants are jointly and severally liable, apportionment of the offer is not required. (*Ibid.*)

In the offers to compromise, each plaintiff set forth a specific sum "to settle all claims against SHEA HOMES, INC.; SHEA HOMES LIMITED PARTNERSHIP; and SHEA HOMES LIMITED PARTNERSHIP, a California Limited Partnership." Shea Homes claims that "[s]ince the offers were not apportioned, they were not valid."

Respondents disagree and claim: 1) in the third amended complaint, they sued all three Shea Homes entity defendants jointly as "Developer Defendants"; 2) these defendants were "not separated from one another in regards to any of the causes of action

stated against them," 3) defendants answered the complaint "jointly," and 4) they were represented by the same counsel. They are correct.

In the causes of action for strict products liability, breach of the implied warranty of fitness for intended use, and breach of the implied "WARRANTY OF MERCHANTABILITY," plaintiffs uniformly alleged the "DEVELOPER DEFENDANTS, and each of them," were liable for the damages. In the breach of contract cause of action, plaintiffs alleged that they entered into sales contracts "with DEVELOPER DEFENDANTS" and that the "DEVELOPER DEFENDANTS" owed plaintiffs a "'fiduciary duty of utmost care . . . .'" They also alleged a breach of warranty cause of action against the "DEVELOPER DEFENDANTS." Plaintiffs sought economic damages.

Defendants answered the third amended complaint together and were represented by the same counsel. In that pleading, they referred to themselves as "this answering defendant." In their answer, they did not set forth separate or individual defenses. The 22 affirmative defenses in that pleading were identical for all defendants. In the complaint, plaintiffs were not seeking separate or different types of damages from each defendant. They did not claim that defendants had engaged in individual acts that formed the basis for separate causes of action or claims against individual developer defendants. They did not state separate causes of action against each defendant. Instead, plaintiffs sued them as if they were a single entity engaging in identical acts and omissions, and subject to identical liability. At the time plaintiffs made the section 998 offers, there was no "potentially varying liability." (*Burch v. Children's Hospital of Orange County Thrift Stores, Inc.*, *supra*, 109 Cal.App.4th at p. 547.) There was no error.

The $5,000 Cost Award for an Assistant to Plaintiffs' Counsel

Shea Homes contends the referee erred by awarding costs for the services of Melissa Fox, an assistant to plaintiff's counsel, for her work at the hearing. It claims that because the parties agreed to bear their own attorney's fees, this cost award was, in essence, an erroneous award of attorney's fees in the form of compensation for paralegal services. Shea Homes argues that not granting its motion to tax these costs was error.

Respondents disagree and note that they sought $14,812.50 for Fox's services in "establishing and managing a database for the exhibits." But the referee reduced the award to $5,000, which constituted her time in assisting the referee at the hearing. They claim that Shea Homes has not shown error. We agree.

"A costs award is reviewed on appeal for abuse of discretion." (*El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc.* (2007) 150 Cal.App.4th 612, 617.) The general rule is that "the party who prevails in any action or proceeding 'is entitled as a matter of right to recover costs . . . .'" (*Id*. at p. 616.) Allowable costs include "'[m]odels and blowups of exhibits and photocopies of exhibits . . . if they were reasonably helpful to aid the trier of fact.'" (*Ibid.*) A trier of fact has discretion to award additional costs "'reasonably necessary to the conduct of the litigation'" if they are "reasonable in amount." (*Ibid.*)

In her declaration, Leslie Eng, counsel for plaintiffs, said: 1) Fox "processed thousands of pages of documents and digital photographic image files"; 2) Fox "compiled, prepared, and copied such documents and images as exhibits both on paper and into electronic exhibit databases for later presentation at the Judicial Reference Hearing"; 3) Fox's "preparation of exhibits" included "establishing, managing, and maintaining the exhibit database for the hearing; printing multiple copies of exhibits for the Referee [and] opposing counsel"; and 4) an "electronic display of documents, exhibits, and demonstrative summaries" at the hearing "would not have been possible" without Fox's efforts.

Courts have held that allowable costs may include the labor necessary to present exhibits which are "reasonably necessary to the conduct of the litigation." (*El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc., supra,* 150 Cal.App.4th at p. 616.) The trier of fact is initially in the best position to make this determination because of its direct involvement in the trial.

Here the referee concluded that Fox's services fell within two categories: 1) work performed which assisted plaintiffs in trial preparation, and 2) "the aid she provided to [the referee]" as the trier of fact in this case. The referee concluded that the services in

the first category were not recoverable costs, but the times spent in the second category were proper costs. He noted that at the hearing, Fox was using "her software" and "all of the data that she had on her computer" to "[call] up on to her screen exhibits that not only aided the [trier] of fact, but seemed to me aided Shea as well in the presentation of Shea's case." The referee said, "Ms. Fox aided me materially with respect to the presentation of the case. And in my view, although the case took probably more time than any of us would have anticipated, she probably reduced the total time that it would have taken by . . . her method of presentation. . . . I'm going to grant in part Ms. Fox fees . . . reduced to the sum of $5,000 awarded to plaintiffs."

The referee's experience working with Fox at the hearings provided a superior vantage point to assess the significance of Fox's services and to identify which part of it benefited the trier of fact. From Eng's declaration, the referee could also find that Fox's work was reasonably necessary. Shea Homes has not shown an abuse of discretion.

We have reviewed the parties remaining contentions and conclude they will not change the result we have reached.

The judgment and orders the parties have appealed are affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Frederick H. Bysshe, Judge

Superior Court County of Ventura

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Milstein Adelman, LLP, Fred M. Adelman, Mayo L. Makarczyk for Plaintiffs and Appellants Chito and Nenita Antangan et al. and Plaintiffs and Respondents Jimmy and Estela Alcova et al.

Wood, Smith, Henning & Berman, LLP, Daniel A. Berman, Stacey Friedman Blank for Defendant, Respondent and Appellant Shea Homes Limited Partnership.